Office of Chief Counsel
Internal Revenue Service

memorandum

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TSMoraviaIsrael

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to: Mirtha Pujol, International Team Manager (LMSB) Group 1685
South Florida District

att'n: Paul Goldman, International Examiner

from: Associate Area Counsel (Miami), CC:LM:RFP:MIA

Subject: [redacted]

DISCLOSURE STATEMENT

This advice constitutes return information subject to I.R.C. § 6103. This advice contains confidential information subject to attorney-client and deliberative process privileges and if prepared in contemplation of litigation, subject to the attorney work product privilege. Accordingly, the Examination or Appeals recipient of this document may provide it only to those persons whose official tax administration duties with respect to this case require such disclosure. In no event may this document be provided to Examination, Appeals, or other persons beyond those specifically indicated in this statement. This advice may not be disclosed to taxpayers or their representatives.

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FACTS

[redacted] (hereinafter referred to as "taxpayer") is a U.S. 1120 with a "direct 25% foreign shareholder", that being [redacted], for fiscal year ending [redacted]. For fiscal year [redacted], Taxpayer filed a U.S. income tax return (Form 1120), but did not attach the requisite Form 5472 to reflect [redacted]'s ownership in [redacted]. Furthermore, taxpayer

failed to report transactions between it and its related entity as required under the regulations of I.R.C. § 6038A.

During the audit, taxpayer's representative submitted a copy of a Form 5472 and stated that although the Form was not filed with the U.S. income tax return, a copy of the Form was filed with the Philadelphia Service Center. Thus far, the International Examiner has been unable to verify whether the Philadelphia Service Center is in possession of taxpayer's Form 5472 for fiscal year [redacted].

Taxpayer's representative indicated to the Examiner that the Form 5472 was not properly filed because it was basically an "oversight." Taxpayer's representative further stated, at a later date, that they were unsure as to the existence of a 25% foreign shareholder.

A letter from the representative dated [redacted] maintains that the penalty should not be imposed because "reasonable cause exists" for failure to file Form 5472. **See taxpayer's letter attached as Exhibit A.** The "reasonable causes" for failure to file Form 5472 include:

1) Taxpayer was not aware of the reporting requirements, but that the foreign ownership of [redacted] was disclosed on the U.S. 1120. Furthermore, the U.S. 1120 indicated that a Form 5472 was attached, although one was never included with the filing of the U.S. income tax return.

2) Taxpayer's failure to attach Form 5472 to the U.S. income tax return was an inadvertent omission. Taxpayer relied on their "professional advisors" for compliance.

3) Taxpayer's "past and future track record" of having filed Form 5472.

4) Taxpayer's failure to report other transactions (those between it and the foreign owner) was due to lack of knowledge.

LAW AND ANALYSIS

I.R.C. § 6038A provides, in relevant part, that any domestic corporation which is 25-percent foreign-owned shall furnish, in accordance with the prescribed regulations:

(1) the name, principal place of business, nature of business, and country or countries in which the foreign owner is organized or resident,

(2) the manner in which the domestic corporation is related to the foreign owner or a related party, and

(3) the dollar amount of transactions between the domestic corporation and the foreign owner (or related party).

Treas. Reg. § 1.6038A-2 provides that this information is to be reported on a Form 5472. This same regulation also provides for the reporting of monetary consideration paid or received, including: consideration paid/received for sales and purchases of stock in trade, consideration paid/received for services and amounts borrowed or loaned. Treas. Reg. § 1.6038A-2(b)(3). Failure to provide the required information will result in the assessment of a $10,000.00 penalty for each taxable year, unless due to reasonable cause. Treas. Reg. § 1.6038A-4(a), (b). Generally, the provisions of I.R.C. § 6038A applicable here are effective after July 1989 and the detailed implementing regulations are effective after December 1990.

The taxpayer bears the burden of affirmatively demonstrating reasonable cause, which necessitates taking into consideration all of the facts and circumstances of the case. "Reliance on . . . . professional advice . . . . constitutes reasonable cause and good faith if, under all the circumstances, the reliance was reasonable." Treas. Reg. § 1.6038A-4(b)(2)(ii),(iii). Generally, reliance on the substantive advice of an informed, qualified professional is reasonable. In contrast, the taxpayer's reliance on a professional to carry out ministerial duties not requiring special expertise, such as timely filing a return, is not reasonable. U.S. v. Boyle, 469 U.S. 241 (1985).

Here, the facts indicate that the penalty is appropriately asserted. Taxpayer is a domestic corporation, with more than 25% foreign ownership, which both received and paid significant sums to foreign related parties. Consequently, taxpayer is a "reporting corporation" with "reportable transactions" and should have attached a Form 5472 to its tax return for fiscal year [redacted].

Taxpayer has not demonstrated reasonable cause for its failure to file the Form 5472. First, it is likely that the filing of the Form 5472 is a ministerial act for which the taxpayers cannot be excused of responsibility. Second, even if the filing of a Form 5472 is not a ministerial act and the

taxpayer could theoretically rely on a professional, taxpayer has not shown reliance on an informed, qualified professional. Taxpayer's representative admits to having filed the form in the past, therefore the need for the filing of Form 5472, or looking into whether it would be necessary, for this fiscal year should have become apparent to the accountant and/or the taxpayer. Either the accountants were not informed of the foreign ownership or failed to realize the significance of such ownership.

Based on the described facts, we believe that the penalty is appropriately asserted. If you have any questions regarding the foregoing, please contact Tamara S. Moravia-Israel at (305)982-5319. We are closing our case file on this matter.

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By: _____
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